IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
JUDGES: MICHAEL R. SMOLENSKI, HELENE N. WHITE AND KRISTEN FRANK KELLY

WEXFORD MEDICAL GROUP,

Petitioner-Appellant,

v

CITY OF CADILLAC,

Respondent-Appellee.

Supreme Court No. 127152

Court of Appeals No. 250197

MTT Docket No. 00-276304

BRIEF ON APPEAL-APPELLEE
ORAL ARGUMENT REQUESTED

Roger L. Wotila (P22561)
Cynthia Wotila (P36043)
McCurdy & Wotila
Professional Corporation
Attorneys for Respondent-Appellee
120 West Harris Street
Cadillac, Michigan 49601
(231)775-1391

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

CASES

Page

STATUTES

STATEMENT OF BASIS OF JURISDICTION

Appellee City of Cadillac accepts the statement of basis of jurisdiction of Appellant Wexford Medical Group.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. **DID THE MICHIGAN TAX TRIBUNAL RULE CORRECTLY THAT APPELLANT/ WEXFORD MEDICAL GROUP WAS NOT ENTITLED TO AN EXEMPTION FROM AD VALOREM PROPERTY TAXES PURSUANT TO MCL 211.7(o) AND MCL 211.9(a)?**

   Petitioner-Appellant would say "No."

   Respondent-Appellee says "Yes."

   The Court of Appeals and Tax Tribunal said "Yes."

2. **WAS THE MICHIGAN TAX TRIBUNAL'S RULING THAT APPELLANT/WEXFORD MEDICAL GROUP WAS NOT ENTITLED TO A PUBLIC HEALTH EXEMPTION UNDER MCL 211.7(r) SUPPORTED BY COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE?**

   Petitioner-Appellant would say "No."

   Respondent-Appellee says "Yes."

   The Court of Appeals and Tax Tribunal said "Yes."

3. **BY FOCUSING ON WHETHER WEXFORD'S ACTIVITIES, TAKEN AS A WHOLE, CONSTITUTE A CHARITABLE GIFT FOR THE BENEFIT OF THE GENERAL PUBLIC, DID THE TAX TRIBUNAL AND JUDICIARY ESTABLISH AN IMPROPER THRESHOLD?**

   Petitioner-Appellant would say "No."

   Respondent-Appellee says "Yes."

   The Court of Appeals and Tax Tribunal said "Yes."

COUNTER-STATEMENT OF FACTS

This case involves real and personal property located at 520 Cobb Street, Cadillac, Michigan, owned and operated by Petitioner/Appellant, Wexford Medical Group (hereinafter referred to as "Wexford").

Wexford employs physicians in a variety of practice areas and treats both children and adults. Wexford has approximately 40-44,000 patient visits per year. (App at 8a and 92a). Wexford claims it operates a "charity care program" that provides medical care to patients who qualify for and avail themselves of the program. In 2000 and 2001 (the tax years involved in this appeal) patients availed themselves of the "charity program" as follows:

a. In 2000, of 40,000 to 44,000 patient visits, two patients utilized this program who received services valued at approximately $129 and

b. In 2001, "there were eleven patients in that program with services valued at about $2,002". (App at 92a, 93a).

Appellant Wexford has a budget of approximately ten million dollars per year. (App at 15a, 10b). Thus, of the two years in question (2000 and 2001) and a total budget of approximately $20,000,000, charitable care was provided under the "charity care program" to thirteen patients with a total value of charitable services of approximately $2,229. (App at 92a).

Wexford presented evidence that it treats a significant percentage of Medicaid or Medicare patients, and that these payments constitute approximately 50% of its practice. (App at 15a, 57a). Testimony established that other Cadillac area providers also treat a significant percentage of Medicaid or Medicare patients. For example, Dr. Betts-Barbus

of Mackinaw Trail Health Associates testified that her pediatric practice treats approximately 40% Medicaid patients. (App at 22b, 23b). That practice claims no similar "charitable" property tax exemption. Other medical practices in the Cadillac area also treat a significant portion of Medicare or Medicaid patients. (App 31a, 32a). The precise proportion of Medicare or Medicaid reimbursement to these other practices was not established.

Physicians at Wexford are compensated by a guaranteed base salary with a productivity bonus system. (App at 14a, 15a, 7b, 8b). The Director of Wexford, Mr. Zdrodowski, described the bonus system "like a piecemeal worker in a factory where there is–when they complete a piece, they receive a rate for that piece." (App at 8b). He also described this as a "productivity payment system". He testified this system of payment is not out of the ordinary in general statewide.

The physicians at Wexford sign a non-compete provision with their contract. Each physician upon leaving Wexford Medical is prohibited from practicing for two years within a 60 mile radius of Cadillac. When questioned regarding physicians that have left the practice, Mr. Zdrodowski confirmed that three physicians had left and each had satisfied the 60 mile radius provision, as one returned to Syria, another left for Indianapolis and a third (a physician's assistant) had health problems and left the practice of medicine. (App at 13a, 166a, 167a).

Mr. Zdrodowski also testified that Wexford Medical Group has two people working as "financial counselors" (App at 68a, 69a). A patient who would otherwise qualify for free charity care is counseled "to get them into the appropriate available program" such as Medicaid and Medicare. (App at 68a, 69a).

Wexford also claimed it provides health clinics, education classes and other services to the general public which would constitute "charitable programs". (App at 83a to 91a). The cost of these services was never specifically established by Wexford Medical Group at trial, but in cross-examination it was conceded that these services constitute less than 5% of Wexford's annual budget. (App at 112 a).

Wexford is a "fifty/fifty joint venture" of Trinity Health Services and Munson Health Care. (App at 51a, 52a). According to Wexford's by-laws (Article 6, Section 6.1) Trinity and Munson share equally in net operating income or losses from Wexford. (App at 144a, 145a)

The CEO of Wexford, John MacLeod, testified at the Tribunal hearing. Regarding the two parent operations, he confirmed that Munson "is in the black currently" and "I think overall Trinity is in the black currently." (App at 21a). That is, both parent corporations were operating profitably. Mr. MacLeod stated there exists a plan or a "goal" for Wexford to become profitable within three to five years.

> Q. "And Munson knew they had not been profitable. Wasn't there essentially a plan that within 3-5 years this group was going to become profitable?"
>
> A. "That's certainly the goal."
>
> Q. "And the goal is still for Wexford Medical Group to be profitable?"
>
> A. "I would say that is correct." (App at 13b)

Michael Zdrodowski is the director of clinical operations at Wexford. (App at 12a). He testified that in the two years at issue, 2000 and 2001, Wexford lost approximately $731,000 and $673,000 respectively. In the first quarter of calendar year 2002, Wexford

had reduced that loss to approximately $75,000 for the quarter. (Presumably on target for $300,000 loss for the year.) (App at 77a).

Mr. Zdrodowski was asked about a list of services provided by Wexford to the community. While a few of the services were provided by Wexford exclusively, Mr. Zdrodowski conceded that several were provided by other groups as well. (App at 83a to 91a). For example, of the listed services, Mr. Zdrodowski conceded that other medical groups provided American Heart Association CPR classes, pediatric educational lectures, community health fairs including education on diabetes, high blood pressure, blood glucose screenings and blood pressure screenings. Mr. Zdrodowski also admitted that other groups besides Wexford provided sports physicals, mamograms, osteoporosis screenings, endogin drug programs and flu vaccine clinics. (App at 83 a to 91a).

No testimony was provided at the Tribunal hearing that the hours of operation of Wexford are anything other than typical business hours.

It was brought out that the hospital and the community have recently opened a free clinic. The free clinic is staffed by various Cadillac area participating physicians. A few physicians from Wexford Group participate in the free clinic, but not all of them. (App at 11b, 14b, 15b). The free clinic is the result of a community wide response to the need. This free clinic is not related to Wexford's practice. (App at 11b, 14b, 15b, 24b, 25b, 26b).

The Michigan Tax Tribunal in its Opinion and Judgment issued on July 17, 2003 determined these facts were insufficient to qualify Wexford for the property Tax exemptions as either a charitable institution or public health organization. Wexford Medical Group appealed. The Michigan Court of Appeals affirmed the Tax Tribunal in an opinion dated August 24, 2004.

LEGAL ARGUMENT

I. THE MICHIGAN TAX TRIBUNAL RULED CORRECTLY THAT APPELLANT/WEXFORD MEDICAL GROUP WAS NOT ENTITLED TO AN EXEMPTION FROM AD VALOREM PROPERTY TAXES PURSUANT TO MCL 211.7(o) AND MCL 211.9(a).

A. STANDARD OF REVIEW

On appeal, an appellate court is bound by the factual determinations of the Michigan Tax Tribunal. *Association of Little Friends v City of Escanaba*, 360 NW2d 602, 138 Mich App 302 (1985). In the absence of fraud, the Court's review is limited to whether the Tax Tribunal's decision is authorized by law and is supported by competent, material and substantial evidence on the whole record. Competent, material and substantial evidence is more than a scintilla of evidence, although it may be substantially less than a preponderance of evidence. *Jones v Laughlin Steel Corporation v City of Warren*, 483 NW2d 416, 193 Mich App 348 (1992).

The Court refined this test in *McBride v Pontiac School District* (on remand) 553 NW2d 646, 218 Mich App 113, 123 (1996) as follows:

> Under this test, it does not matter that the contrary position is supported by more evidence, that is which way the evidence preponderates, but only whether the position adopted by the agency is supported by evidence from which legitimate and supportable inferences were drawn.

B. ELEMENTS OF MCL 211.7(o) AND MCL 211.9(a)

Wexford requested an exemption from ad valorem property taxes pursuant to MCL §211.7(o) which provides in pertinent part as follows:

> Property owned and occupied by a nonprofit, charitable institution while occupied by that nonprofit, charitable institution solely for the purposes for which it was incorporated is exempt from the collection of taxes under this Act. MCL § 211.7(o).

MCL §211.9(a), in pertinent part, provides that:

> The personal property of charitable, educational, and scientific institutions incorporated under the law of this state is exempt from taxation. MCL §211.9(a)

Both MCL 211.7(o) and MCL 211.9(a) contain an ownership element to qualify for an exemption as a charitable institution. The fact that Wexford meets the ownership elements of MCL 2.11.7(o) and MCL 211.9(a) is undisputed. Wexford concedes that 13% of its premises are leased to independent contractors and, therefore, the exemption does not apply. The issue revolves around whether Wexford is operating as a charitable institution with regard to the remaining 87% of its property.

The legislature did not define charitable institution for purposes of the statute. Numerous cases have sought to clarify the meaning of "charitable institution."

In interpreting the statutory language, the Michigan Supreme Court articulated the following:

> The proper focus . . . is whether . . . activities, taken as a whole, constitute a charitable gift for the benefit of the general public without restriction or for the benefit of an indefinite

> number of persons. *Michigan United Conservation Clubs v Lansing Township*, 378 NW2d 737, 423 Mich 661 (1985) (Emphasis added.)

The crux of this case revolves around what constitutes a gift for the benefit of the general public or for the benefit of an indefinite number of persons. Wexford apparently takes the position that as long as the taxpayer owns the property and claims it is open to patients, regardless of ability to pay, it is entitled to the exemption. Essentially, Wexford alleges it is only necessary to make the gift <u>available</u> to an indefinite number of persons regardless of the number of people who actually accept the gift.

In reviewing statutory interpretation, the Court in *Rose Hill Center Inc., v Holly Township*, 568 NW2d 332, 224 Mich App 28 (1997) stated the following principal:

> The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature in enacting a provision. 568 NW2d 332, 335

Furthermore, tax exemption statutes are to be strictly construed in favor of the taxing unit. *Michigan United Conservation Clubs v Lansing Township*, 378 NW2d 737, 423 Mich 661 (1985). The Court in *Rose Hill* cautioned against a strained construction of the statute adverse to the legislature's intent. Yet according to Wexford's interpretation, the fact that only 13 of over 80,000 patient visits in a two year period availed themselves of the "gift" is irrelevant. If this were the case, obtaining tax exempt status in the medical profession would be a relatively simple matter. Given that the statutory tax scheme contemplates exemptions as an exception to taxation, this interpretation is obviously a strained reading of the legislative intent.

Wexford also relies on the fact that it is a 26 USC 501 (c) (3) corporation. However, this fact standing alone certainly does not resolve the issue. Wexford cites no Michigan precedent for the position that 501 (c) (3) status automatically entitles an organization to a charitable property tax exemption. To the contrary, this Court has stated specifically that there is no presumption in favor of exemption based upon 501 (c) 3 status. *Ladies Literary Club v City of Grand Rapids*, 409 Mich 748; 298 NW 2d 422 (1980). Other jurisdictions that have addressed the issue have also concluded that 501 (c) (3) status does not translate to an automatic charitable property tax exemption. See for example *Planned Parenthood of Burgen County, Inc. v Hackensack City* 12 N.J. Tax 598 (1992), *Bethesda Health Care, Inc. v Wilkins* 101 Ohio St. 3d 420, 806 NE2d 142 (2004), *Sioux Valley Hospital Association v South Dakota State Board of Equalization* 513 NW2d 562 (1994), *Fulton, Board of Tax Assessors v Visiting Nurse Health System* 243 Ga. App. 64, 532 SE2d 4016 (2000), *Sturdy Memorial Foundation, Inc. v Board of Assessors of North Attleborough* 60 Mass. App. Ct. 573, 804 NE2d 368 (2004). These cases consistently recognize that the test employed for establishing a state property tax exemption is different than the federal 501 (c) (3) criteria.

In determining whether or not Wexford qualifies as a charitable organization, the proper focus is whether the organization's activities taken as a whole constitute a charitable gift for the benefit of the general public. The charitable purpose exemption under MCL 211.7(o) was examined in *Holland Homes v the City of Grand Rapids*, 557 NW2d 118, 219 Mich App 384 (1996). The Court defined charity as follows:

> Charity . . . is a gift, to be applied consistently with existing laws, for the benefit of an indefinite

> number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. 219 Mich App 384, 399

In *Holland Homes*, the Petitioner was a Michigan non-profit association owning licensed homes for the aged, and argued that its "gift" was continuing care for elderly persons even when their financial resources were exhausted. The Court, however, rejected this argument noting that the services were, in fact, rendered pursuant to a contract of care and thus the definition of charity did not apply. The Court noted that the facilities were not being operated for indigent or infirm who had no means of support. There was, therefore, no "gift" for an indefinite number of persons for the benefit of the general public. When its activities are examined in their entirety, it is difficult to see what gift Wexford is providing.

As a whole, Wexford's practice is that of any typical group physician offices. The practice caters to self-pay patients, third-party pay patients, such as Blue Cross/Blue Shield and Medicare and Medicaid. As the Tax Tribunal noted below, Medicare and Medicaid are insurance programs, albeit provided by the government. As such, losses sustained from non-collection of fees from Medicare/Medicaid patients cannot be considered charity. The collections from each type of patient, whether self-pay, Blue Cross/Blue Shield or other insurance or Medicare/Medicaid are calculated in Wexford's cost of doing business.

In addition, the Tax Tribunal noted in *ProMed Healthcare v City of Kalamazoo*, MTT Docket No. 236826 (1999) that mere allegations by Petitioner that it provides an

"appropriate level of charity care" to residents of the community who are not otherwise able to pay for their care is inadequate to establish an exemption. The Tax Tribunal articulated their position in this manner, "Determining the appropriate level of charity care needed to qualify for exemption is for the Tax Tribunal to determine and is not solely based on whatever level the parties agree upon. Therefore, it is within the domain of this Tribunal to decide this issue." *Supra*, at page 6.

On Appeal in *ProMed*, the court elaborated on this point as follows:

> Clearly, the parties did not stipulate that Promed actually provided an "appropriate level of charity care" to members of the public, during the tax years at issue. Rather, the stipulation simply provided that Promed's internal policies required Promed to do so. Below, Promed failed to present any evidence that it complied with this internal charity policy. Further, Promed failed to present evidence that its provision of charitable medical care constituted anything more than an incidental part of its operations. *ProMed Healthcare v City of Kalamazoo*, 644 NW2d 47, 249 Mich App 490 (2002).

As in *ProMed*, Wexford's Articles indicate that it will provide medical services for indigent patients. Like *Promed*, the evidence produced by Wexford shows that in fact, the number of people who qualify under the Charitable Care Policy is actually very minimal. The Court noted in *Promed*, the level of charity care appears to be no more than an incidental part of its physician practices. The *Promed* Court concluded this is clearly not what the legislature intended by codifying the charitable organization exemption. The Tax Tribunal below correctly followed the *Promed* standard.

Just as Wexford's charity care policy does not constitute a gift within the meaning of the statute, neither does Wexford lessen the burdens of government. Wexford makes an arduous, attenuated plea that due to the percentage of Medicare/Medicaid patients it see, it lessens the burden of government. Yet Wexford's actions contradict this claim. It has a policy of signing patients up for Medicaid who would otherwise receive free charity care. This actually increases, rather than lessens the burden of government.

> "And if they present at our clinic, our first option – we have two people that we call financial counselors who meet with people who are unable to – who don't have resources to pay their bills. They will work with those patients to get them into the appropriate available program. So Medicaid, Medicare, the Mi Child program through the state, Healthy Families program through the state. So probably the biggest reason why those numbers aren't bigger is that we were able to or those people were eligible for these state and federally-funded programs."
> (App at 68a, 69a)

Thus individuals eligible for Wexford's "free" charity care are actually enrolled by Wexford's "financial counselors" into Medicaid, Medicare or other state run programs. The charity care patient who would otherwise receive medical treatment free of charge becomes a Medicaid or Medicare patient, for whom the government foots the bill. Wexford curiously argues this lessens the "burden of government".

All of Wexford's doctors are also required to enter into a "non-compete agreement." Specifically, upon ending employment, the physician may not compete within a 60-mile radius of Cadillac, Michigan for 2 years. (App at 13a, 166a, 167a). Wexford fails to explain how this policy either "lessens the burden of government" or is consistent with Wexford being a "charitable care" organization. Yet, Wexford stressed in its Brief that the

Cadillac, Michigan area is a rural health care area where it is difficult to attract physicians. Accepting this as the case, it seems most incongrous that a "charitable" care medical group would force physicians out of the area should they leave the "charitable medical" practice. Such a clause is consistent with Wexford being a typical medical practice rather than a "charitable" practice. In his testimony Mr. Zdrodowski confirmed that 3 physicians had left Wexford between 1999 and 2002. Two were practicing more than 60 miles away and one had medical problems and ceased practice. Hence, the Non-compete clause was never waived. (App at 3b, 4b).

II. THE MICHIGAN TAX TRIBUNAL'S RULING THAT APPELLANT/WEXFORD MEDICAL GROUP WAS NOT ENTITLED TO A PUBLIC HEALTH EXEMPTION UNDER MCL 211.7(r) WAS SUPPORTED BY COMPETENT, MATERIAL AND SUBSTANTIAL EVIDENCE.

A. STANDARD OF REVIEW

Factual findings of the Tax Tribunal are final, provided they are supported by competent, material and substantial evidence based on the record as a whole. *Rose Hill Center Inc., v Holly Township*, 568 NW2d 332, 224 Mich App 28 (1997). Judicial review therefore is limited to a determination of whether the Tax Tribunal's decision is authorized by law and whether it is supported by competent, material and substantial evidence. *Association of Little Friends v City of Escanaba*, 360 NW2d 602, 138 Mich App 302 (1985).

B. WEXFORD MEDICAL GROUP IS NOT USED FOR PUBLIC HEALTH PURPOSES

Wexford seeks an exemption as a facility used for public health purposes pursuant to MCL 211.7(r) which provides in pertinent part:

> The real estate with the buildings and other property located on the real estate on that acreage, owned and occupied by a non-profit trust and used for hospital or public health purposes is exempt from taxation under this act . . . MCL 211.7(r)

The ownership element of the exemption is not an issue in this case. The exemption revolves around whether Wexford uses its property for public health purposes. The Tax Tribunal decision that Wexford does not use the property for public health purposes is supported by competent, material and substantial evidence.

The term "public health purposes" is not defined by the statute. When a statutory term is not defined, the Court may consult a dictionary definition. *Rose Hill Center Inc., v Holly Township*, 568 NW2d 332, 224 Mich App 28 (1997).

The Tax Tribunal below cited the definition adopted by *Rose Hill* as follows:

> The art and science of protecting and improving community health by means of preventative medicine, health education, communicable disease control, and the application of the social and sanitary sciences. (At Page 335.) (Emphasis added.)

The focus of *Rose Hill's* definition was on the community health aspect of a practice. In *Rose Hill*, the Court found that Petitioner was engaged in public health purposes by operating a facility for the mentally ill. Among the factors the Court found significant were that the Petitioner was staffed by a psychiatrist, psychiatric nurses, and social workers. In addition, the Court noted the Petitioner provided twenty-four (24) hour care to its patients, and was open to mentally ill adults without regard to race, religion or sex.

Of particular significance was the fact that the Petitioner provided 24 hour care to its patients. Furthermore, as the Tax Tribunal pointed out in *Promed Healthcare v City of Kalamazoo*, MTT Docket No. 236826 (1999):

> The public health definition relied on in *Rose Hill* centers on the inclusive definition of serving community health. Respondent has failed to

> prove that the office and personal property at issue here are used in any other way than in the typical private practice of medicine and not for purposes of protecting and improving community health. (Emphasis added.)

In this case, the Tax Tribunal found significant parallels between *Promed* and Wexford. *Promed* acquired the subject property through a merger with Professional Medical Center, Inc. At the time of the merger, the office facilities were owned by a non-profit corporation whose principal asset was Burgess Hospital. Following the merger, *Promed* employed a majority of the previous employees, except for those physicians and certain para-professionals who became independent contractors. Notwithstanding the merger, the patient services provided by Professional Medical Center, Inc. were not substantially changed after the merger.

Such is the case here. The Tax Tribunal was not convinced Wexford demonstrated its operations differed from those of Medical Arts Group, its predecessor.

Appellant Wexford relies in substantial part upon a 1904 Michigan Supreme Court case, *Michigan Sanitarium & Benevolent Association v Battle Creek*, 13 Mich. 676; 101 NW 855 (1904). However, that case was decided under a completely different statutory scheme which has now been abrogated. First the law applied only to "a hospital or other charitable asylum" and contained no qualifying language. It simply said that said "asylum" buildings "shall, while occupied for the objects and purposes thereof, be exempt from taxation." 138 Mich 676, 680. Similarly, Appellant relies, again at page 19 of its brief, upon *Auditor General v R.B. Smith Memorial Hospital Association*, 293 Mich 36; 291 NW 13 (1940) which also interpreted a separate and now defunct statutory scheme.

Respondent's witness, Dr. Susan Betts-Barbus, formerly employed by Medical Arts Group, testified that, for the most part, Wexford is essentially the same medical practice with the exception of some changes in physician employment. (App at 36a). From her perspective as a medical professional, Dr. Susan Betts-Barbus did not see any differences between her own private medical pediatric practice and that of Wexford. (App at 16b, 17b).

As testified by Michael Zdrodowski, Wexford's employment contracts with its physicians are comparable to other medical practices in the area. (App at 8b, 9b).

The Tax Tribunal below correctly determined that the numerous services Wexford cites as serving public health purposes are no different than services inherent in the medical profession. Wexford treats a wide range of medical conditions, but so did Medical Arts before it. Wexford offers a variety of health clinics and education classes to the community. Many of these services, however, are held in conjunction with Mercy Hospital. As such, they do not convincingly indicate that Wexford, as opposed to Mercy Hospital, is a facility used for public health services.

Stated otherwise, while Wexford may serve a health purpose, Wexford did not establish that it primarily serves a public health purpose. Certainly it is presumed that all doctors, medical practices, health care professionals, hospitals and clinics have as their goal to serve and promote the health of their patients. It does not follow, a priori, that a typical private family practice health practice serves the public health envisioned under MCL § 211.7 r.

In determining whether Petitioner was entitled to an exemption, the Tax Tribunal correctly focused on which aspects of Wexford's practice enhanced community health and could be differentiated from a standard medical practice. Although not controlling on the

issue, the Public Health Code provides some guidance as to the legislative intent concerning what constitutes public health purposes. MCL 333.2433(1) provides:

> A local health department shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health through organized programs, including prevention and control of environmental health hazards; prevention and control of diseases; prevention and control of health problems of particularly vulnerable population groups; development of healthcare facilities and health services delivery systems; and regulation of healthcare facilities and health services delivery systems to the extent provided by law.

These activities encompass a broad based plan to address health issues facing the entire population of a given geographical area. They involve assessment of underlying community health, developing area wide health policy, promoting and encouraging health behaviors among the population at large, responding to disasters which pose health problems and assisting communities in recovery, monitoring public health problems in the community, and researching new insights and potential solutions to health problems.

Appellant's brief and those of the Amici Curiae argue that the Tax Tribunal and Court of Appeals held that the charitable exemption applicable only if the services were provided entirely without compensation.[2] Yet, the Tax Tribunal in its conclusions of law (pages 23-33 Michigan Tax Tribunal Opinion) never employed such a test. There is no such language to be found in the Tax Tribunal Opinion. The Court of Appeals did make reference to the fact that services were performed in exchange for payment, but does not

---

[2]See Amicus Brief of McLaren Health Care Corporation pages 5-8 and Appellant's Brief pages 14-16.

base its opinion upon this fact. Rather the Court of Appeals relied upon the Tax Tribunal Opinion and the ProMed Health Case, each of which found that the medical practices in question was "a fairly typical medical practice". The Court of Appeals also noted Wexford failed to present evidence that its "provision of charitable medical care constituted anything more than an incidental part of its operations." In short, the Court of Appeals was clearly relying on the totality of the circumstances test, as employed by the Tax Tribunal.

In the similar case of *Butterworth Health Corporation v Gaines Charter Township*, MTT 236443 (1999), the Tax Tribunal once again concluded that Petitioner's facilities (medical offices), while owned and operated by a nonprofit corporation, were not used for public health purposes. In that case, the Tax Tribunal cited the fact that the medical practice being carried on by Petitioner was indistinguishable from a private doctor's office. It noted:

> The public health definition relied upon in *Rose Hill Center* centers on serving community health; the office in which Doctors Steen and Davis practiced family medicine was used in the typical private practice of medicine and not for purposes of protecting and improving community health. Doctors Steen and Davis, as PCS employees, moved their private medical practice into the Pavilion and welcomed new patients until terminating their employment with PCS on August 31, 1997. The nature of the medical practice did not change; it remained a private practice without a public health purpose. Ibid.

Once again, the parallels between *Butterworth Health Corporation* and Wexford are noteworthy. Both function primarily as private medical practices. For the most part, Wexford's patients are individuals with independent insurance or payment methods. The health clinics and education classes which Wexford provide are not its primary purpose,

but rather incidental to the operation of a typical family medical practice. The Tax Tribunal correctly noted the educational services and clinics provided by Wexford amounted to less than 5% of its ten million ($10,000,000) dollar annual budget.

Generally, an Appellate Court will defer to the Tax Tribunal in interpreting a statute that it is delegated to administer. *Rose Hill Center Inc., v Holly Township*, 568 NW2d 332, 224 Mich App 28 (1997). The Tax Tribunal has repeatedly interpreted the public health purpose exemption to require the taxpayer be operated as something other than a typical family medical practice.

Under the facts of this case, the Tax Tribunal's decision was supported by competent, material and substantial evidence and should not be disturbed.

III. By Focusing On Whether Wexford's Activities, Taken As A Whole, Constitute A Charitable Gift for the Benefit of the General Public, The Tax Tribunal And Judiciary Have Not Established An Improper Threshold.

In its order granting Leave To Appeal, this Court posed the question whether the Tax Tribunal or Judiciary may impose a "threshold" regarding eligibility for charitable property tax exemptions in the absence of legislative action.

In *Michigan United Conservation Clubs v Lansing Township*, 378 NW2d 737, 423 Mich 661 (1985) the Michigan Supreme Court addressed this question:

> "The proper focus...is whether ...activities, taken as a whole, constitute a charitable gift for the benefit of the general public without restriction or for the benefit of an indefinite number of persons".

In dealing with a very similar question, the Ohio Supreme Court stated:

> "Whether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable use of property must be determined on the totality of the circumstances; there is no absolute percentage". *Bethesda Health Care, Inc. v Wilkins* 101 Ohio St. 3d 420, 426, 806 N.E. 2d 142, 148 (2004).

This totality of the circumstances test has been employed consistently by other jurisdictions. See for example *Sturdy Memorial Foundation, Inc. v Board of Assessors of North Attleborough* 60 Mass. App. Ct. 573, 804 N.E. 2d 368 (2004); *Fulton County Board of Tax Assessors v Visiting Nurse Health System of Metropolitan Atlanta, Inc.* 243 Ga. App. 64, 542 SE2d 4016 (2000); *Town of Wolfeboro, N.H.* ____ A. 2d ____, W.L. 1668682 N.H. (2005).

The Amicus Brief of the Michigan Association of Homes and Services for the Aging argues that the plain language of the statutes contain no "threshold amount of charity needed" before Wexford can qualify as a charitable institution.

The appellants as well as the Amici briefs urge this court to set no standard at all when qualifying for a charitable exemption. Such an argument confuses the Court's role in reviewing the totality of the charitable activities of the institution with the establishment of a rigid "threshold". Appellee City of Cadillac does not suggest that this court should set a rigid percentage or dollar amount of charitable care to establish a qualifying "threshold". Rather, Appellee maintains that it is the judiciary's role to examine the specific activities of an organization to determine whether it falls within the claimed statutory exemption. As stated in Rosehill, supra, it is the function of the judiciary "to ascertain and give effect to the intent of the legislature...". 568 NW2d 332, 335.

This Court has consistently employed this approach of statutory interpretation. For example, in *Kreiner v Fischer* 471 Mich. 109, 683 NW 3d 611 (2004) this Court reviewed the No-Fault "threshold" of an accident victim who had suffered a "serious impairment of a body function". MCL 500.3135 (17). The Court did not attempt to quantify the "no-fault threshold" in terms of a percentage of lost work hours or lost income. Instead it instructed the lower courts to consider all the facts and circumstances to determine whether the injury rose to the level of affecting "the person's general ability to conduct the course of his or her normal life". *Kreiner* gave a vivid example of the "totality of the circumstances test".

> "whether an impairment that precludes a person from throwing a ninety-five miles-an-hour fastball is a "serious impairment of body function" may depend on whether the person is a professional baseball player or an accountant who likes to

> play catch with his son every once in awhile." 683 NW2d 611, 626. Ft. Note 19.

Appellant Wexford presents a curious and inconsistent "floodgates" argument on appeal. It first posts an alarmist claim that:

> "Given the strength of Wexford's exemption claims, virtually every Michigan non-profit, non-hospital health care facility will become taxable if this Court denies Wexford exemption." Appellant's Brief at pages 12-13.

This incredible jump in logic flies in the face of the totality of the circumstances test employed by the Tax Tribunal and the Michigan Courts. That is, each case is examined on its own individual merits. What is remarkable about this sophistic tactic is that Appellant Wexford employs it both as a sword and a shield. Later in its Brief, Wexford attacks the opinion of the Michigan Court of Appeals employing the same reasoning! Wexford criticizes the language in the *ProMed* decision. There the Court noted that if it accepted ProMed's argument, it "would in effect be granting tax exempt status to every doctor's office in the State, as well as every organization offering health-related services, as long as those organizations are structured as non-profit corporations and maintain policies of offering some "appropriate" level of charity medical care to indigent persons." (*ProMed Health* at 500-501 and Appellant's Brief at page 24). Appellant Wexford belittles this "floodgates" argument stating:

> "It is based on the unfounded fear that exempting Wexford would provoke an exemption stampede that includes every family practice...and in fact this has not occurred even though facilities like Wexford have been exempt for decades." Appellant's Brief at page 24.

Thus, Wexford first invokes the fear that a denial of an exemption to Wexford will result in "virtually every Michigan non-profit" health care facility becoming taxable (page 12 of its Brief). Wexford then criticizes the Court of Appeals for opining that Wexford's position (as presented in *ProMed*) would grant tax exempt status to every medical office in the State. Wexford fails to acknowledge that a totality of the circumstances test in each individual case closes the "floodgates" argument.

CONCLUSION AND RELIEF REQUESTED

Wexford serviced 13 charitable patients over a 2 year period out of 88,000 patient visits. The value of those services totaled $2,400 of a $20,000,000 budget. Wexford cannot seriously maintain it qualifies for a charitable property tax exemption based on these facts.

The real issue, which is not being honestly fronted out, is the claim that any practice which accepts Medicare and Medicaid, is, a priori, charitable.

The reason the issue is not being dealt with in a straight forward manner is that the law does not support this position.

The problems with health care in this country must be dealt with in an intellectually honest manner by Congress and the State legislators. It cannot be solved by the judicial activism being proposed by the Appellants. The established law does not justify a "charitable exemption" in this case.

The broader issues facing our culture and our country regarding the health care system should be addressed by all of the interested parties at the federal and state legislative levels in a comprehensive manner. Those are the forums where health care and professional organizations, citizens, insurance companies and government must come together to craft a global solution for these issues.

While Appellants characterize the Tax Tribunal and Court of Appeals as "disingenuous" in denying their claim,[3] such vitriol will not mask the real agenda of the Appellants. That agenda is misplaced. The efforts of the Appellants are best served to

---

[3]Appellant's Brief page 19

join hands with all interested parties, including the cities and municipalities, in cooperating with our legislative bodies to establish new, innovative and just approaches to the 21st century health care issues in which we all have a stake.

Appellee respectfully requests that the decisions of the Tax Tribunal and Court of Appeals be affirmed.

Respectfully submitted,

McCURDY & WOTILA, P.C.
Attorneys for Respondent-Appellee

Dated: August 19, 2005

By: _____

Roger Wotila (P22561)
Cynthia Wotila (P36043)
McCurdy & Wotila, P.C.
120 West Harris Street
Cadillac, Michigan 49601
231) 775-1391